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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968

No. 214.

ANNA MARY WHITE,
Petitioner,

vs.

EVANSVILLE AMERICAN LEGION HOME ASSOCIATION,
Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA.

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RESPONDENT'S ARGUMENT THAT WHEN THE INDIANA SUPREME COURT ORDERED PETITIONER'S NEW TRIAL IT DID NOT CONSIDER THE CROSS-ERROR PETITION WHICH CONTENDED THAT THE FAILURE OF COUNT ONE OF PETITIONER'S TWO COUNT COMPLAINT PRECLUDED A NEW TRIAL IS UTTERLY RIDICULOUS.

Respondent contends on page 2 of its brief that when this case was before the Indiana Supreme Court on the second appeal at the time it reversed the Appellate Court

and ordered a new trial for the petitioner, that the said Supreme Court did not **consider** the question presented by its cross-errors to the effect that the mere withdrawal from the jury's consideration of count one of petitioner's two-count complaint resulted in a final judgment. If there was a final judgment which barred petitioner from proceeding on count two of her complaint, how could the Supreme Court have ordered a new trial for the petitioner? Respondent's argument simply does not make sense.

How, and by what magic, could respondent or the Appellate Court of Indiana know what prompted the Indiana Supreme Court to grant petitioner's new trial? (Or what it considered, or failed to consider?) The question had been extensively brought before the Indiana Supreme Court by respondent's cross-errors. In fact, respondent's cross-errors were devoted exclusively to the question. The Appellate Court of Indiana even wrote an unusually long opinion on the same. The matter was briefed by numerous briefs in the Indiana Supreme Court and it was orally argued in the Indiana Supreme Court. Petitioner pointed out on page 20 of her Petition for Writ of Certiorari in this Court that there were eleven different ways in which the question was presented to the Supreme Court of Indiana. Petitioner even quoted from Justice Jackson, who was the lone member of the Supreme Court that dissented. He dissented because, as he said:

> "The doctrine of res judicata applies and appellant herein cannot recover.
>
> The Petition to Transfer should be denied."

See White v. Evansville American Legion Home Association, 210 N. E. 2d 845, page 850.

Since the Appellate Court had actually written an opinion on the question which was before the Supreme Court

when that Court wrote its opinion, and since respondent's cross-errors were confined solely to this question, and since the matter was raised in the Petition to Transfer to the Indiana Supreme Court, and in respondent's Petition for Rehearing, and since there were numerous briefs filed on the question, and since it was orally argued in the Supreme Court, and since one of the Indiana Supreme Court Justices actually wrote a dissenting opinion on the very question, how in the name of common sense and in fairness can anyone say that the Indiana Supreme Court did not **consider** the point? The matter was so completely devoid of merit that there was no occasion for the Supreme Court to mention it in its opinion. If the matter had any merit, of course, the Supreme Court would not have ordered a new trial because the case would have been at an end on October 25, 1960.

THE FEDERAL QUESTION INVOLVED IN THE INDIANA SUPREME COURT'S DENIAL OF PETITIONER'S RIGHT OF TRIAL WAS RAISED AT THE FIRST OPPORTUNITY.

It will be recalled that when this case was before the Appellate Court the second time that Court held that petitioner's failure on count one of her complaint precluded her right of trial based on count two of the complaint. This decision was appealed to the Supreme Court and it was reversed and the petitioner was granted a new trial. Since the Supreme Court is the highest court of Indiana this became the law of the case.

When the case came before the Supreme Court the third and last time, the Supreme Court refused to enforce its own order and refused to enforce petitioner's right of trial as granted by the Supreme Court. This was the first time the Supreme Court had given any indication of its intention not to enforce its own order.

The petitioner duly and timely filed her Motion for Rehearing and in said motion the petitioner raised the federal question concerning the Indiana Supreme Court's refusal to enforce petitioner's right of trial. **This was the first time the federal question arose, and of course, the first time it could be raised.** In fact, this question was raised in two different sections of petitioner's petition, as follows, to-wit (R. A-20-22):

> "10. The Supreme Court by granting the plaintiff herein a new trial in 1965, White v. Evansville American Legion Home Association, 210 N. E. 2d 845, ... Ind. App. ..., which resulted in a judgment for the plaintiff for the sum of $17,750.00 and costs, and by now allowing and permitting the Appellate Court to rewrite for the second time the Appellate Court's former opinion holding that plaintiff's cause of action ended in 1960 (207 N. E. 2d 820, ... Ind. App. ..., and 230 N. E. 2d 623, ..., Ind. ...) has thereby deprived the plaintiff of her property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States.
>
> "11. This Court took the jurisdiction of this case away from the Appellate Court, reversed said Appellate Court's decision which held that the judgment of October 25, 1960 was a final judgment which ended the case in 1960 and then granted the plaintiff a new trial. (See White v. Evansville American Legion Home Association (1965), 210 N. E. 2d 845, ... Ind. App. ...). Pursuant to the order of this Supreme Court the plaintiff retried her case (fifth time) and obtained a judgment in the amount of $17,750.00 and costs. On the defendant's appeal from said judgment the Appellate Court reversed the case and based its reason for reversal solely on the ground that the judgment of October 25, 1960 was a final judgment and ended the case in 1960. This was the identical former

holding of the Appellate Court and is contrary to this Court's above said ruling. Despite this action on the part of the Appellate Court and although the Supreme Court took over jurisdiction of this case, it has failed and refused to render a decision of any type on said question as to the validity of said judgment of October 25, 1960, although proper and timely petitions and briefs have presented the matter to this Court, but this Court has permitted the said Appellate Court decision to be the law of this case, although said Appellate Court decision holds that this case was dead and ceased to exist five years before this Supreme Court wrote said above opinion granting plaintiff a new trial. This Supreme Court has thereby deprived the plaintiff of her property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States. Said deprivation of property consists not only of the deprivation of her said judgment of $17,750.00 and costs, but also the burden and expense of a retrial and appeal on a case that has ceased to exist."

We thus see that the petitioner raised this particular phase of the federal question the first time and in the only way it was possible to raise it, i. e., when the fruits of her verdict were taken away from her, and her right to trial voided.

Petitioner pointed out in her Petition for Writ to this Court that the Indiana Supreme Court's order granting a new trial was the law of the case. That order couldn't be taken away in this particular case for any question concerning the finality of the so-called judgment of October 25, 1960 and yet it was taken away from her for no reason.

Respondent, in support of its contention that the federal question should have been raised sooner, cites several

cases, none of which bear out respondent's position. In fact, in Herndon v. Georgia, 295 U. S. 441 (1935), the first case cited by respondent, holds exactly what petitioner contends the law is. On page 444 of said opinion, the Court said:

> "There is no doubt that the federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity of raising it."

There was no occasion to think that the Supreme Court would repudiate its own order. This is particularly true because the Supreme Court had reversed the Appellate Court in this same case for the opinion it had written on the very question presented.

We would like to point out at this time also that in Indiana a case cannot be transferred from the Appellate Court of Indiana to the Supreme Court of Indiana as a matter of right. This procedure is governed entirely by the rules of the Supreme Court, being Rule 2-23, which provided as follows:

> "* * * the petition shall set forth * * * That the opinion of the Appellate Court:
>
> (a) contravenes a ruling precedent of the Supreme Court, indicating the ruling precedent;
>
> (b) or that the opinion of the Appellate Court erroneously decides a new question of law, concisely stating the same;
>
> (c) or that the Appellate Court failed to give a statement in writing of each substantial question arising on the record and the decision of the Court thereon."

It will thus be seen that the fact that a federal question is involved could not be put in the Petition to Transfer because it is not a reason provided for in Rule 2-23 of

the Indiana Supreme Court. If the petitioner had have inserted in her Petition to Transfer that matter, it would have subjected her petition to dismissal. The decisions of Indiana have been very strict in this respect.

See:

Pittsburgh etc., R. Co. v. Hoffman, 200 Ind. 178 (1928);

In re Aurora Gas Light etc., Co., 186 Ind. 690 (1917);

State ex rel. Toll Rd. Com. v. St. Joseph S. C. etc., 233 Ind. 47 (1953).

No ground not permitted by the rules of the Court should go into such a petition, and no argument or brief should be included. Furthermore, the rule specifically states that if a brief is to be filed it cannot be included in the petition, but must be separate and apart therefrom.

It is interesting to note that the respondent itself first injected into the case the violation of the provisions of the United States Constitution in its Petition to Transfer from the Appellate Court to the Supreme Court, when the case was on appeal the second time. We see that in its said petition, on page 10, it said as follows:

> "The Court has deprived Appellee and Cross-Appellant of the equal protection of the laws contrary to and in violation of the Fourteenth Amendment of the Constitution of the United States of America. . . ."

Respondent's petition also contended that there were three other provisions of federal constitution that were violated. (pages 8, 9 and 10 of said petition.)

RESPONDENT HAS MADE NO ATTEMPT WHATSOEVER TO ANSWER PETITIONER'S CONTENTION THAT HER RIGHT OF TRIAL AND THE FRUITS THEREOF HAVE BEEN TAKEN AWAY FROM HER, IN VIOLATION OF THE FEDERAL CONSTITUTION.

The respondent has completely and wholly failed to answer the questions presented in petitioner's Petition for Writ of Certiorari.

Respondent in its brief before this Court has referred to

"the prior judgment of October 25, 1960"

and at other times refers to it as

"the former judgment of October 25, 1960".

Respondent's said references are deceptive. There never has been in this case any

"prior judgment"

and there never has been any

"former judgment"

in this case. If there had ever been a

"prior judgment"

or if there had ever been a

"former judgment"

of course, the petitioner could not have had a second "day in court", as a "prior" or "former" judgment would have been a final judgment that disposed of her cause of action. **All that there ever was in this case was a failure of one count of a two-count complaint. The two counts were pending at the time one of the counts was withdrawn from the jury.** It is important, of course, to remember that all the trial court did was to withdraw one of the two counts of the complaint. Respondent realizes that there could be no *res judicata* where both

counts of the complaint were present during the time that one was withdrawn.

The petitioner did not file her lawsuit and suffer a judgment to be rendered against her and later come back in another suit upon a different theory of complaint. This, of course, did not happen. If it had been the case this petitioner's petition would never have been filed.

In answer to petitioner's proposition that the failure of count one of petitioner's two-count complaint did not preclude her right to pursue her cause of acion on count two, respondent merely says that this was governed by state procedural and substantive law and that it will not oblige petitioner by stating that law. Petitioner does not know what state procedural or substantive law respondent refers to that could wipe out and discard the petitioner's right of trial as ordered by the highest court of the State of Indiana. It would appear that if respondent knew of any such law, it would cite it in its brief. What the state court did in this case was to deny the petitioner a right of trial.

Respondent gives a dissertation in its brief to the effect that the Fourteenth Amendment does not guarantee anyone the right to a trial by jury in a civil action. We will not extend this brief in answer except to say that whether or not a state may abolish jury trials in some classes or types of cases is not involved here, but what is involved is that all citizens of the State of Indiana must be treated equally. That right cannot be taken away in a particular case.

Respondent further says in its brief that petitioner was granted five different jury trials, or at least partial trials, and this is true, but the favorable results of these trials were taken away, contrary to the Fourteenth Amendment of the Constitution of the United States.

Finally, respondent says that when the Indiana Supreme Court granted petitioner her new trial she had no vested interest in her judgment of $17,750.00. Similarly, it must be conceded that whatever interest the petitioner had in said new trial, she could not be **divested** of same without due process of law, which has not been accorded her in this case. When this case was retried, after the highest court of the State of Indiana gave petitioner her new trial, there is not even any contention that anything happened in that retrial that was erroneous or that was any cause whatsoever for taking away the fruits of petitioner's last trial. The only thing that has been advanced has been a claim that there was a final judgment entered in the case on October 25, 1960, which was five years prior to the time that the Indiana Supreme Court granted said new trial and the so-called finality of this so-called judgment of October 25, 1960 had been rejected previously by the Indiana Supreme Court. That became the law of the case and the matter was irrevocably at an end.

Petitioner, in her Petition for a Writ of Certiorari, cited the case of Dagley v. Armstrong Rubber Co., 344 F. 2d 245 (1965), which specifically holds that the failure of one count of a two-count complaint does not prejudice the right of a party to proceed on the second count of complaint and yet respondent has failed to make any answer whatsoever about this case and it has cited none.

We submit that this Dagley case, supra, is completely determinative of the paramount question presented.

CONCLUSION.

Respondent's arguments that petitioner has been granted five jury trials and the case is still alive or "respondent would not be burdened with a reply" are nothing more than exercises in semantics. They are totally

devoid of any weight in the light of the undisputed and uncontradicted record in this case which demonstrates that even though the trials were granted by the trial courts, and in one instance ordered by the Indiana Supreme Court, the Appellate Courts of Indiana in an unheard of and without legal precedent manner reverted back eight years to deprive this petitioner of her right of action, her right to trial by jury, and the benefit of a favorable jury verdict. The method by which this was accomplished is not fair, nor is it right. This case clearly cries out for help by this Court to afford due process of law, as guaranteed by the Fourteenth Amendment to one of our elder citizens who has waited so patiently in the courts. Contrary to the respondent counsel's arguments, we submit that the guarantees of a citizen's right of action, right of trial by jury, and the benefits thereof, are of the greatest importance to our society, are fundamental to our legal system, and present substantial constitutional issues. For such reasons and the fact that this petitioner has been denied such rights this case is of sufficient importance for this Court to grant Certiorari.

Respectfully submitted,

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